No. 128170

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- OLIVER J. HUTT, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 4-19-0142 and 4-19-0271 (Consolidated). There on appeal from the Circuit Court of the Eighth Judicial Circuit, Adams County, Illinois, No. 17-CF-405, 17-DT-51. Honorable Robert K. Adrian, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

Oliver J. Hutt was convicted of obstructing justice in 17-CF-405 and driving under the influence in 17-DT-51, after a bench trial for both cases. He was sentenced to twenty-four months of probation in 17-CF-405 and twelve months of probation in 17-DT-51.

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUES PRESENTED FOR REVIEW

I.

Whether the trial court improperly denied Oliver Hutt a jury trial in 17-DT-51, when he never waived that right, and counsel was ineffective for misrepresenting the existence of a jury waiver to the court.

II.

Whether the evidence was insufficient to find Oliver Hutt guilty of obstruction of justice when he took no action to conceal or destroy evidence and the search warrant did not command him to do anything.

STATUTES AND RULES INVOLVED

720 ILCS 5/31-4(a) (2017):

"Obstructing justice.

(a) A person obstructs justice when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he or she knowingly commits any of the following acts:

(1) Destroys, alters, conceals or disguises physical evidence, plants false evidence, furnishes false information; or

(2) Induces a witness having knowledge material to the subject at issue to leave the State or conceal himself or herself; or

(3) Possessing knowledge material to the subject at issue, he or she leaves the State or conceals himself; or

(4) If a parent, legal guardian, or caretaker of a child under 13 years of age reports materially false information to a law enforcement agency, medical examiner, coroner, State's Attorney, or other governmental agency during an investigation of the disappearance or death of a child under circumstances described in subsection (a) or (b) of Section 10-10 of this Code."

STATEMENT OF FACTS

On May 20, 2017, Oliver Hutt was arrested on suspicion of driving under the influence (DUI), improper lane usage, and leaving the scene of an accident. (R. 117).[1] He was also later charged with obstruction of justice for events arising out of this arrest and the subsequent investigation. (4-19-0142 C. 9).

On October 10, 2018, a "final pre-trial hearing" was held on some of the cases that Oliver was charged with. (4-19-0142 R. 75). In calling the cases for hearing, the trial court only mentioned two case numbers: the obstruction of justice case (17-CF-405), and an unrelated, previously charged case for resisting an officer (16-CF-752). (4-19-0142 R. 75). Case number 17-DT-51, the pending DUI charge that arose out of the same facts as the obstruction case, was never mentioned in open court that day. (See 4-19-0142 R. 76-91).

At that hearing, defense counsel initially announced that the defense was ready for jury trial. (4-19-0142 R. 76). As the court was reviewing with Oliver the possible penalties in 16-CF-752, Oliver disputed whether he was eligible for extended-term sentencing. (4-19-0142 R. 80). After the State represented their position that Oliver was so eligible, the trial court went on to review the possible penalties in 17-CF-405. (4-19-0142 R. 82-83). Oliver indicated that he understood the possible penalties in those two cases and then the court inquired as to whether any negotiations had taken place. (4-19-0142 R. 85-86). The court then took a brief break so that Oliver could discuss the most recent offer with his attorney. (4-19-0142 R. 87).

When the court reconvened, (again, calling only the unrelated cases for resisting an officer in 16-CF-752 and obstruction of justice in 17-CF-405, and again *not* calling the DUI case of 17-DT-51), defense counsel indicated to the court that Oliver wished to accept the State's offer on both of those cases. (4-19-0142 R. 87-88). Defense counsel advised the court

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[1] As its chronology encompasses both cases, citations herein will be to case number 4-19-0271 unless otherwise noted.

that he had prepared a jury waiver for Oliver to sign. (R. 89). The court indicated that it had "now been handed a written waiver of your right to a jury trial in Adams County Cases 16-CF-752 and 17-CF-405"and asked Oliver if that was his signature on the document. (4-19-0142 R. 90). Oliver confirmed that it was. (4-19-0142 R. 91). The cases were then continued for the "setting of a plea" to October 25, 2017. (4-19-0142 R. 91). The "Pre-Trial Conference Order (Criminal)" entered on that day lists 16-CF-752, 17-CF-405, 17-DT-51, 17-TR-2415, and 17-TR-2416 (traffic citations for improper lane usage and leaving the scene of accident) in its caption. (C. 30). That document says that "Defendant waives jury and cause referred to Judge Adrian for plea (or bench trial setting) on the 25th of October in Courtroom # 1B," and the phrase "CAUSE STRICKEN FROM THE JURY DOCKET" is underlined. (C. 30). The written jury waiver entered that day, though, only lists cases 16-CF-752 and 17-CF-405 (and not the DUI case). (4-19-0142 C. 37).

On October 25, 2017, the court explicitly called cases 16-CF-752, 17-CF-405, 17-DT-51, 17-TR-2415 and 17-TR-2416, and asked defense counsel for their status. (R. 52). Defense counsel advised the court:

> "Mr. Hutt had previously waived his right to a jury trial. Beyond that, I honestly don't know how we would like to proceed today. Mr. Hutt has asked me to file a couple of different motions with the Court. I've explored both the facts in this case as well as the relevant law. I do not believe either of those motions to have any merit; therefore, I will not be filing those. I've explained to Mr. Hutt my reasoning. I've explained to him his options based on my reasoning and my stance, and I've explained to him his options in this case going forward. And he refuses to respond to my questions as to how he would like to proceed other than to direct me to make those filings." (R. 52).

The following exchange was then held:

> "THE COURT: All right. Mr. Hutt, you've waived your right to a jury trial, so unless there's some other request from you, we are going to set these matters for a bench trial because that would be the next appropriate step.
> [DEFENSE COUNSEL] MR. PRATT: Your Honor, there is a negotiation in place that Mr. Hutt had waived his right to a jury trial. I believe that negotiation is still available to him. So as I've explained to Mr. Hutt, his options are either set it for a bench trial or accept that negotiation and set this matter for a plea.

> THE COURT: Well, Mr. Hutt, you going to accept the – the plea, or are you going to ask that it be set for bench trial?
> THE DEFENDANT: I was asking for my jury trial because I was facing – they're telling me I'm facing extended term, and I shouldn't be facing extended term. My last conviction was 2/25 of 2002, and they keep coming with dates of 2013 and 2008 to put me in a ten-year period. And they tried to force my wife to testify against me against her will, and that's the reason why I waived my jury trial.
>
> THE COURT: Okay. Well, you waived your right to a jury trial. That's a waiver of jury trial, and unless you would file something to withdraw that, you've waived your right to a jury trial. And the Court at this time is – you've been admonished on what your potential sentence would be, and the Court is not going to readmonish you at this time unless your attorney tells me that he was – that you were admonished wrong.
> MR. PRATT: Your Honor, I've explored the issue regarding the extended term including speaking with the Missouri Department of Corrections. I believe that the admonishments regarding extended term are accurate. I have no evidence other than Mr. Hutt's word to think otherwise. And in a tendency between someone's word and official documents, I'm going to go with the official documents. So at this time, I do not believe a motion to withdraw his guilty – or his waiver of jury trial would be appropriate or have any merit, so I will not be filing that motion." (R. 53-54).

The court then set the cases for bench trial, saying that Oliver had waived his right to a jury trial. (R. 55).

After a number of continuances, all of the cases were called again on March 21, 2018. (R. 64). On that date, defense counsel informed the court that Mr. Hutt wished to proceed to trial on 17-CF-405 (the obstruction charge arising out of the circumstances involving 17-DT-51), and that Oliver was, in fact, insisting on his right to jury trial. (R. 66). Defense counsel advised the court that "I informed him that, on the date that he had waived in this case, he had waived on both of those cases going so far as to show him the scanned copy of that waiver contained with the circuit clerk's file. He does not agree with that." (R. 66). The court requested a transcript of the October 10, 2017, hearing "because the Court would need to know what was said when he waived before the Court could make any determination if he waived on both cases or what he was told." (R. 66).

When court reconvened on April 25, 2018, there was no mention of the requested transcript. (See R. 77-80). Instead, defense counsel informed the court that "Mr. Hutt indicates that he still wants to take that to trial. He had waived earlier his right to a jury trial, so he needs to set that for a bench trial." (R. 77).

On June 26, 2018, a bench trial was held on the DUI charge in 17-DT-51 and on the obstruction of justice charge in 17-CF-405. (R. 82). The 17-DT-51 case alleged, via citation, that Oliver committed the offense of driving under the influence of alcohol in violation of 625 ILCS 5/11-501(a)(2). (C. 8). The 17-CF-405 case alleged, via Information, that Oliver committed the offense of obstructing justice in that he, with the intent to obstruct the prosecution of himself, intentionally concealed evidence from "Quincy Police Officer, in that he refused to submit to blood and urine testing after being ordered to comply with such through a search warrant," in violation of 720 ILCS 5/31-4(a). (C. 9).

At trial, Nikita Paetow testified that she lived at 5th & Sycamore, Quincy, Illinois, on May 20, 2017. (R. 86). She was making lunch that day when she heard a "loud boom." (R. 87). Nikita looked out and saw that a truck parked in front of her house was dented and a black car was taking off down the street. (R. 87). It appeared that the black car had hit the truck that belonged to her friend. (R. 88-89). Nikita and her husband got in their truck and went around the block, looking for the driver, who jumped out of the car and "took off up the street." (R. 88-90). When the driver exited the crashed vehicle, he was about thirty-five feet away, and he fell three times, facing Nikita when he got up. (R. 99). Nikita eventually saw the driver crossing the street, into a residence's driveway on 4th and Sycamore. (R. 92). She called the police, who came and took her statement and information. The police asked her to identify a photograph on the officer's cell phone. (R. 93). She indicated that the person in the photograph was the driver. (R. 94). Nikita also made an in-court identification of Oliver as that driver. (R. 94-95).However, she testified that she never saw the person that the police had arrested and placed in the squad car, just the photograph that they showed her. (R. 101).

Zach Bemis testified that he is an officer with the Quincy Police Department and that he was on patrol on May 20, 2017. (R. 105). Bemis was flagged down by a female in the area of 5th and Sycamore on that day. (R. 106). She informed him that there was a male individual "sitting on a front porch that wasn't supposed to be there." (R. 108). Bemis observed a black Ford vehicle in middle of road with heavy front-end damage. (R. 108). That vehicle was registered to Oliver Hutt. (R. 109). Bemis also observed that a GMC truck parked in close proximity to the front of that black Ford that had damage consistent with the Ford hitting it. (R. 111). The GMC had been legally parked. (R. 112). Bemis then made contact with the individual that was on the porch. (R. 112). The porch belonged to Valerie Fletcher, who flagged Bemis down. (R. 112). Bemis testified that he recognized the man on the porch as soon as he saw him. (R. 113). Bemis said that he knew the man to be Oliver Hutt from previous contacts, and made an in-court identification of Oliver as the same person. (R. 114). Bemis asked Oliver what he was doing there and if he drove the vehicle that was parked in the middle of the road. (R. 114). According to Bemis, Oliver said that he had been there all day and he did not drive anything. (R. 114). Bemis said that Oliver appeared to be intoxicated, with alcohol on his breath, and his eyes bloodshot and glassy. (R. 115). Bemis indicated that Oliver slurred his words, talking really slowly. (R. 115). According to Bemis, Oliver gave no explanation for why he was on the porch near an accident involving a vehicle registered to him. (R. 116).

Bemis placed Oliver under arrest for leaving the scene of an accident, DUI, and improper lane usage. (R. 117). Bemis then transported Oliver back to 5th and Sycamore in the squad car, where Bemis hoped to find a witness to identify Oliver as the driver. (R. 117-18). When they arrived, according to Bemis, Oliver refused to get out of the car. (R. 118). Bemis then took Oliver's picture, while Oliver was in custody and in the back of a squad car. (R. 118). Bemis testified that he showed the picture to a person who claimed to see the driver exit the vehicle, and that person identified the person in custody as the person she had seen exiting the Ford. (R. 118).

Bemis then transported Oliver to headquarters, where Oliver refused to do any field sobriety tests. (R. 119). Bemis read Oliver the warning to motorist and asked if Oliver would submit to a breath alcohol test and Oliver said no. (R. 119).

Bemis testified that he then began working on a complaint for a search warrant, which was eventually obtained. (R. 120). The search warrant said, in its entirety:

> "In the Circuit Court of the Eighth Judicial Circuit
> Of Illinois, Adams County
> To All Law Enforcement Officers:
>
> On this day, Officer Zach Bemis, Complainant, has subscribed and sworn to a Complainant for Search Warrant before me. Upon examination of the Complaint I find that it states facts sufficient to show probable cause.
> I, therefore, command that you search:
>
> 1) the body of Oliver J. Hutt, B/M DOB: 3/26/79 and seize the following instruments, articles and things:
>
> Blood and urine for the presence of alcohol and/or drugs,
>
> which have been used in the commission of, or which constitute evidence of the offenses of: Driving under the Influence of Alcohol and /or Drugs.
>
> I further command that a return of anything so seized shall be made without unnecessary delay before me, or before any court of competent jurisdiction." (C. 39).

The search warrant was signed by the Honorable Judge Adrian, who also presided over the bench trial. (R. 120).

Bemis further testified that Officer MeGee transported Oliver to Blessing Hospital, and Bemis met them there with the signed search warrant. (R. 120). Bemis informed Oliver that a warrant was signed for blood and urine, so he needed to provide them with samples. (R. 120). Oliver said that he needed time to think about it. (R. 120). Bemis told him that he did not have time to think about it, that they needed to do it now. (R. 120). Oliver asked the hospital staff what his bond was. (R. 122-23). Bemis took that as a refusal "since he would not submit to the tests that he was being ordered to submit to." (R. 123). Bemis could not recall if he had told Oliver that a refusal would result in further charges. (R. 123).

On cross-examination, Bemis agreed that the warrant says that it commands him to seize blood and urine for presence of alcohol and/or drugs, and that it directs officers to do something, but does not direct Oliver to do anything. (R. 126). The search warrant was subsequently admitted into evidence as People's Exhibit 1. (R. 144).

On redirect, Bemis testified that he could not force urine or blood out of Oliver's body. (R. 127) The court asked if Quincy Police Department has a procedure as to how blood or urine is obtained from an individual after receiving a search warrant. (R. 130). Bemis testified that there is not really a written procedure, but that they do not force people to comply. (R. 129).

Quincy Police Officer Robert MeGee testified that when Bemis arrived at the hospital with the search warrant, Bemis showed it to MeGee and Oliver. (R. 141). MeGee testified that when Bemis asked Oliver if he was going to give a blood sample and urine sample, "[h]e said no." (R. 184). But when MeGee was asked if Oliver Hutt "ever specifically answer[ed] or [said] no, I am going to refuse to give you blood or give you urine," MeGee answered "He didn't use those exact words but he was asked if he would provide a blood sample and that the phlebotomist draw his blood or provide a urine sample and he stated no." (R. 141).

On cross examination, the following exchange was held:

> "Q. And you didn't personally ask Mr. Hutt to submit to or provide a blood or urine sample; correct?
> A. I did.
>
> Q. You did?
> A. Yes.
>
> Q. Even though you didn't have the warrant?
> A. Yes. Officer Bemis had asked once. Then Mr. Hutt had talked to the phlebotomist about bond. We informed him that she had nothing to do with bond. She asked if he would provide a sample. And then I asked if he would provide a sample.
>
> Q. And when the phlebotomist asked, he asked her what his bond was; correct?
> A. Correct.
>
> Q. He didn't specifically refuse?
> A. He just asked what bond was." (R. 142-43).

Oliver did not testify or present any other evidence. (R. 188).

The trial court found that Oliver was the driver of the vehicle, and found him guilty of improper lane usage, leaving the scene, and DUI. (R. 157-59). However, the court had several questions concerning appropriateness of the obstruction charge in a case where a Defendant does not submit when being ordered to give blood/urine. (R. 159).

> "However, the Court can now rely on appellate – appellate direction because there is an Appellate Court case precedent in this case which actually is right on point on this. It was actually appealed and the Appellate Court says it is a proper charge in this case and did find the defendant or affirmed the finding of the defendant's guilt in a situation just like this where there is a search warrant and the defendant failed to submit to the testing and the Court says that, in fact, that is and can be the basis for an obstructing justice charge because, in fact, the body is concealing the evidence as to the driving under the influence because every minute that goes by, the body is dissipating that alcohol and that is concealing the evidence. And when the defendant does not submit to that, does not submit to the search warrant, then he is concealing that evidence and so that is a proper charge.
>
> In this case, the defendant, while he never refused, the issue is he never submitted, and it's not the refusal that is the key here as to a refusal with the statutory summary suspension, it's the fact that he doesn't submit because every minute that goes by that he doesn't submit, then he is concealing that evidence. And so the fact that he didn't submit when asked to is the key, and he never submitted to that even though he was asked three different times, according to Officer MeGee, to submit, he never did. He never submitted. He continued to conceal that evidence. And so the Court would find the defendant guilty of obstructing justice." (R. 202-03).

Oliver was sentenced for the obstruction of justice and leaving the scene on February 25, 2019. (4-19-0142 C. 52). His sentence on those charges was to twenty-four months of probation, fines and costs, and 180 days in jail, with credit for seventy days served and the remainder stayed, pending review. (4-19-0142 C. 52). Oliver was sentenced for the DUI on April 30, 2019. (C. 53). His sentence on that charge was to twelve months of probation, with the usual terms of DUI probation, including the requirement that he reimburse the probation department for covering the cost of his evaluation. (C. 54). He was ordered to pay fines and costs in both cases. (C. 55; 4-19-0142 C. 56). He was also ordered to pay restitution in the DUI case. (R. 200-01).

On appeal, the cases were consolidated, and Oliver raised three issues: (1) that Oliver was improperly denied a jury trial when he did not waive that right and trial counsel was ineffective for misrepresenting any such waiver, (2) that the evidence was not sufficient to find Oliver guilty of obstruction of justice beyond a reasonable doubt, and (3) that the trial court's order for restitution was erroneous. *People v. Hutt*, 2022 IL App (4th) 190142, ¶¶ 2-4. As the ruling in *People v. Birge*, 2021 IL 125644, ¶ 49 was released during the pendency of the initial appeal, the Fourth District agreed with Oliver's last argument, vacating the restitution order. *Hutt*, 2022 IL App (4th) 190142, ¶ 74. However, the Appellate Court disagreed with Oliver on the other two arguments and affirmed the convictions. *Id*., at ¶ 76.

On the first issue, the Fourth District held that Oliver's statement "I waived jury trial," made on October 25, 2017, to have contextually meant that he also at some point waived his jury trial in the DUI case. *Id*., at ¶ 43. Because the Appellate Court determined that Oliver waived his right to a jury trial in the DUI case, it held that his argument that counsel was ineffective for misrepresenting such a waiver to be inconsistent with this determination. *Id*., at ¶ 45.

In affirming the conviction for obstruction of justice, the majority of the Fourth District panel relied on language in *People v. Comage*, 241 Ill. 2d 139, 144 (2011), that defined "concealment" as the act of preventing disclosure or recognition of something, or avoiding revelation of something or refraining from revealing something. *Hutt,* 2022 IL App (4th) 190142 ¶ 62. Using this definition, the majority held that Oliver "prevented disclosure or recognition of" his blood, a piece of physical evidence. See *id*.

Justice Cavanagh, while concurring with the rest of the majority's decision, dissented on the issue of whether the evidence was sufficient to sustain a conviction for obstruction of justice. *Id*., at ¶¶ 79-85. This dissent pointed out that when this Court defined concealment

in *Comage* as the act of preventing disclosure of something, that definition applied to the prevention of disclosure of facts or knowledge– not to physical evidence. *Id*., at ¶ 81. In order to conceal physical evidence, such as blood, the dissent said, one would need to place that physical evidence out of sight. *Id*., at ¶¶ 81-83.

In addition to the definition of concealment given in *Comage*, which came from Webster's Third New International Dictionary 469 (1961), the dissent also quoted two other dictionaries. *Id*., at ¶¶ 81-83. All three of these sources, cited by the dissent, show two categories of definitions for the word conceal. *Id*. The first category of definitions describes the keeping of knowledge, information, or feelings from others. *Id*., at ¶¶ 82-83. The second category of definitions from these sources describes the placing out of sight of a physical object. *Id*. The Oxford English Dictionary Online, as cited by Justice Cavanagh, provides the following definitions and examples of the usage of "conceal":

> "1.
> a. transitive. To keep (information, intentions, feelings, etc.) from the knowledge of others; to keep secret from (formerly also to) others; to refrain from disclosing or divulging.
>
> * * *
>
> 1828 W. Scott Fair Maid of Perth iii, in Chron. Canongate 2nd Ser. III. 50 Concealing from him all *knowledge* who or what he was.
> 1883 'G. Lloyd' Ebb & Flow II. xxix. 175 The latter could not conceal her *pleasure* at the bequest.
> 1921 F. Hutchins & C. Hutchins Sword Liberty ii. 27 While the marquis concealed his *intentions*, he openly avowed his sentiments.
> 2010 N.Y. Times 12 Apr. 5/1 He.does not conceal his *feelings* about the state of contemporary opera.
>
> * * *
>
> 2.
> a. transitive. To hide (a person or thing); to put or keep out of sight or notice. Also: to prevent from being visible.
>
> * * *

> 1877 Nineteenth Cent. Oct. 409 He.could have concealed *himself* in any one of a hundred hiding-places.
> 1921 C. Kingston Remarkable Rogues xix. 268 He.had the *canvas* concealed in the false bottom of a trunk and taken to America.
> 1994 Amer. Spectator Nov. 40/2 The behavior is typical of an attempt to conceal a *weapon*.
> 2012 Daily Tel. 20 July 30/2 I'm very conscious of my stomach, so I tend to conceal my *waist*."
>
> *Hutt*, 2022 IL App (4th) 190142, ¶ 82, quoting Oxford English Dictionary Online, https://www.oed.com/view/Entry/38066 (last visited Nov. 19, 2021) (emphasis added).

The Merriam-Webster Online Dictionary, also quoted, gives substantially similar definitions:

> 1: to prevent disclosure or recognition of
>
> // conceal the *truth*
> // She could barely conceal her *anger*.
>
> 2: to place out of sight
>
> // concealed *himself* behind the door
> // The defendant is accused of attempting to conceal *evidence*."
>
> *Hutt*, 2022 IL App (4th) 190142, ¶ 83, quoting Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/conceal (last visited Jan. 6, 2022) (emphasis added).

The dissent went on to point out that Oliver "was accused of concealing evidence, specifically, his blood. That meant he was accused of placing his blood out of sight. He did not do so." *Id.*, at ¶ 83. As Oliver was charged with concealing a thing, *i.e.*, his blood, he would have needed to have taken an affirmative step to place his blood out of sight to be guilty of that charge. ¶ 83. As Oliver did not do so, the dissent would have reversed the conviction for obstruction of justice. *Id*, at ¶¶ 83-85.

This Court granted leave to appeal on May 25, 2022.

ARGUMENT

I.

The trial court improperly denied Oliver Hutt a jury trial in 17-DT-51 when he never waived that right, and counsel was ineffective for misrepresenting the existence of a jury waiver to the court.

Oliver Hutt never waived his right to a jury trial in 17-DT-51 and the trial court erred in insisting on a bench trial as the only available option in light of Oliver's repeated insistence on a jury trial. (R. 53-55, 84; 4-19-0142 76-91). No such waiver was ever made in open court, as is required by statute. 725 ILCS 5/103-6 (2017); *People v. Smith*, 106 Ill.2d 327, 334 (1985). This error was compounded by defense counsel's misrepresentations to the court on the existence of a prior waiver of jury trial. (R. 52-54, 66, 77). Because Oliver was denied his fundamental right to trial by jury and to the effective assistance of counsel, this Court should vacate the finding of guilt in 17-DT-51 and remand the case for further proceedings. *People v. Ruiz*, 367 Ill. App. 3d 236, 239-40 (1st Dist. 2006).

Standard of Review

The question of whether a defendant knowingly, voluntarily, and intelligently waived his right to trial by jury is purely legal and reviewed *de novo*. *People v. Bracey*, 213 Ill.2d 265, 270 (2004); *In re R.A.B.*, 197 Ill.2d 359, 362 (2001). Where, as here, the claim of ineffective assistance of counsel was not raised in the trial court, the standard of review is *de novo*. *People v. Lofton*, 2015 IL App (2d) 130135, ¶ 24.

Authorities

The right to a jury trial in criminal prosecutions is fundamental. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8, 13; *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). In Illinois, a criminal defendant's waiver of his right to a jury trial is valid only if that waiver is knowingly and understandingly made in open court. 725 ILCS 5/103-6; *Smith*, 106 Ill.2d at 334.

"It is the duty of the trial court to see that a waiver of right to jury trial is expressly and understandingly made, and such obligation is not to be perfunctorily discharged." *People v. Sebag*, 110 Ill. App. 3d 821, 828 (2nd Dist. 1982); *People v. Surgeon*, 15 Ill.2d 236, 238 (1958). A determination of the validity of a jury waiver is not subject to any precise formula. *R.A.B.*, 197 Ill.2d at 364. Rather, admonishments must be reviewed in light of the facts and circumstances of each particular case. *Id*. The existence of a written jury waiver is not dispositive of the question of whether the waiver was entered knowingly, voluntarily, and intelligently. *People v. Scott*, 186 Ill.2d 283, 285-86 (1999); *People v. Ruiz*, 367 Ill. App. 3d 236, 237-39 (1st Dist. 2006). Although no set admonition or advice is required from a trial court before an effective waiver may be made, the trial court must nonetheless ensure that the defendant is waiving his right to a jury trial knowingly and voluntarily. *People v. Tooles*, 177 Ill.2d 462, 469-70 (1997); *People v. Lake*, 297 Ill. App. 3d 454, 459 (1st Dist. 1998).

Improper Denial of Jury Trial

Oliver Hutt never waived his right to jury trial in 17-DT-51. (See 4-19-0142 C. 37; see also 4-19-0142 R. 76-90). At the October 10, 2018, pre-trial hearing, the trial court only called the two pending felony cases, and *not* the DUI case. (4-19-0142 R. 75). On that date, Oliver signed a written jury waiver as to those two felony cases, only. (4-19-0142 R. 90-91; 4-19-0142 C. 37). At the next court appearance, on October 25, 2017, defense counsel told the court that Oliver had previously waived his right to a jury trial, and the following exchange occurred:

> "THE DEFENDANT: I was asking for my jury trial because I was facing – they're telling me I'm facing extended term, and I shouldn't be facing extended term. My last conviction was 2/25 of 2002, and they keep coming with dates of 2013 and 2008 to put me in a ten-year period. And they tried to force my wife to testify against me against her will, and that's the reason why I waived my jury trial.
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> THE COURT: Okay. Well, you waived your right to a jury trial. That's a waiver of jury trial, and unless you would file something to withdraw that, you've waived

> your right to a jury trial. And the Court at this time is – you've been admonished on what your potential sentence would be, and the Court is not going to readmonish you at this time unless your attorney tells me that he was – that you were admonished wrong.
>
> MR. PRATT: Your Honor, I've explored the issue regarding the extended term including speaking with the Missouri Department of Corrections. I believe that the admonishments regarding extended term are accurate. I have no evidence other than Mr. Hutt's word to think otherwise. And in a tendency between someone's word and official documents, I'm going to go with the official documents. So at this time, I do not believe a motion to withdraw his guilty – or his waiver of jury trial would be appropriate or have any merit, so I will not be filing that motion." (R. 53-54).

The court then set the cases for bench trial, saying that Oliver had waived his right to a jury trial. (R. 55).

After a number of continuances, all of the cases were called on March 21, 2018. (R. 64). On that date, defense counsel informed the court that Oliver wished to proceed to trial on 17-CF-405 (the obstruction charge arising out of the circumstances involving 17-DT-51), and that Oliver was, in fact, insisting on his right to jury trial. (R. 66). Defense counsel advised the court that "I informed him that, on the date that he had waived in this case, he had waived on both of those cases going so far as to show him the scanned copy of that waiver contained with the circuit clerk's file. He does not agree with that." (R. 66). The court requested a transcript of the October 10, 2017, hearing "because the Court would need to know what was said when he waived before the Court could make any determination if he waived on both cases or what he was told." (R. 66).

When court reconvened on April 25, 2018, there was no mention of the requested transcript. (See R. 77-80). Instead, defense counsel informed the court that "Mr. Hutt indicates that he still wants to take that to trial. He had waived earlier his right to a jury trial, so he needs to set that for a bench trial." (R. 77). The case then proceeded to a bench trial for 17-DT-51 and 17-CF-405 on June 26, 2018.

The trial court's own record-keeping was inaccurate on this question of whether the right to a jury trial was ever waived in 17-DT-51: the "Pre-Trial Conference Order (Criminal)" entered on October 10, 2017, lists all five cases in the caption, including 17-DT-51, and has the box checked next to the section of the form-order indicating that jury trial had been waived. (See C. 30). This incorrectly suggests that Oliver waived his right to jury trial in 17-DT-51, along with the two felony cases. (See C. 30). But 17-DT-51 was never called on October 10, 2017, and Oliver was never admonished or questioned regarding his intention to proceed to trial on that DUI case. (See 4-19-0142 R. 75-91)[2]. Oliver only waived his right to jury trial in cases16-CF-752 and 17-CF-405. (4-19-0142 R. 76-91). Compounding this error, defense counsel repeatedly misrepresented to the court the existence of a jury waiver in the DUI case on October 25, 2017, (R. 52-54), March 21, 2018, (R. 66), and April 25, 2018. (R. 77).

The only document purporting to be a written jury waiver signed by Oliver, in either record, is the written jury waiver entered for cases 16-CF-752 and 17-CF-405. (4-19-0142 C. 37). The DUI charge was never referred to by name or case number at the hearing in which that jury waiver was entered. (See 4-19-0142 R. 76-90). Nevertheless, the trial court listed 17-DT-51 on the pre-trial order entered on that date, suggesting that jury trial had been waived in that case. (See C. 30).

In committing this mistake, the trial court failed in its duty to "see that a waiver of right to jury trial is expressly and understandingly made." *Sebag*, 110 Ill. App. 3d at 828. The trial court also erred in finding that Oliver's right to a jury trial was waived when he never made any such waiver in open court. *Scott*, 186 Ill. 2d at 285 (1999); 725 ILCS 5/103-6.

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[2] Indeed, this is why all citations to this pre-trial hearing include the case number for 4-19-0142, which was the obstruction of justice case, instead of the default citations to 4-19-0271, the DUI case. These proceedings do not appear in the record for the DUI case because that case was not called and no proceedings in the DUI case took place on October 10, 2018. Oliver Hutt could not, therefore, have waived his right to jury trial for the DUI charge on that date.

The court repeated and compounded this mistake by not following up on the transcript request it made on March 21, 2018. (R. 66). By never reviewing the transcripts or re-addressing the issue on the record, the court again failed in its duty to ensure that any waiver of jury trial was expressly made at all, let alone understandingly made. *Id*.

In *Sebag*, the reviewing court held that a perfunctory interaction between the court and the defendant regarding a jury waiver did not suffice to show that the *pro se* defendant knowingly waived his constitutional right to a jury trial. *Sebag*, 110 Ill. App. 3d at 829. The court ruled that the following colloquy was insufficient to show that the defendant knowingly waived this right, even though he signed a jury waiver form:

> "THE COURT: You are entitled to have your case tried before a jury or judge.
> THE DEFENDANT: Judge.
> THE COURT: Jury waiver. Do you understand that by waiving a jury at this time that you cannot reinstate it; do you understand that?
> THE DEFENDANT: Yes." *Id*.

The *Sebag* court found this colloquy insufficient because the defendant should have been advised of the meaning of a trial by jury. *Id*. The court held that it could not be sure that the defendant understood the implications of signing a jury waiver form because he was not fully informed by the trial court, was unfamiliar with criminal proceedings, and was without the benefit of counsel. *Id*.

Although Oliver was not *pro se* like the defendant in *Sebag*, the trial court in this case did not even engage in the colloquy held to be insufficient in *Sebag*. (See 4-19-0142 R. 76-90). The matter of Oliver's waiver of jury trial in 17-DT-51 was simply never raised or initiated, to say nothing of sufficient to qualify as a knowing waiver. See *Sebag*, 110 Ill. App. 3d at 829. Where it is apparent from the record that the requirements of an understanding waiver made in open court were not satisfied, the cause must be remanded for a new trial. *Smith*, 106 Ill. 2d at 337.

In affirming the DUI conviction, the Fourth District ruled that what it described as Oliver's October 25, 2017, statement of "I waived a jury trial" "must have meant all five criminal cases pending against him because all of those cases were being discussed." *People v. Hutt*, 2022 IL App (4th) 190142, ¶ 43[3].

> "Immediately before defendant admitted to the court, "I waived a jury trial," the court told him, "[Y]ou've waived your right to a jury trial, so unless there's some other request from you, we are going to set these matters"—including the DUI case—"for a bench trial because that would be the next appropriate step." In context, then, we deem defendant's acknowledgment "I waived a jury trial"as including the DUI case. In short, the effectiveness of the jury waiver in the DUI case is, at this point, beyond dispute." *Id*.

The section, though, both elides crucial context and overstates the nature of Oliver's statement.

At the beginning of that status hearing on October 25, 2017, the court called all five case numbers, including the DUI case, and asked defense counsel for status. (R. 52). Counsel advised the court that Oliver had "previously waived his right to a jury trial," but did not specify whether that waiver was to all cases or just the felony charges. (R. 52). Then, the trial court repeated that statement to Oliver, telling him that he has waived his right to a jury trial and that the cases would be set for a bench trial. (R. 53). When counsel mentioned that there were plea negotiations taking place, the court asked Oliver if he was going to take the plea or set the case for bench trial. (R. 53). Oliver responded thusly:

> "THE DEFENDANT: I was asking for my jury trial because I was facing – they're telling me I'm facing extended term, and I shouldn't be facing extended term. My last conviction was 2/25 of 2002, and they keep coming with dates of 2013 and 2008 to put me in a ten-year period. And they tried to force my wife to testify against me against her will, *and that's the reason why* I waived my jury trial." (R. 53) (emphasis added).

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[3] The Fourth District's Opinion thrice says that Oliver told the trial court "I waived a jury trial" on October 25, 2017. *Hutt*, 2022 IL App (4th) 190142, ¶ 43. However, no such statement appears in the record. The only statement that Oliver made on October 25, 2017 is the one quoted in full above, in which he says "* * * and that's the reason why I waived my jury trial." (R. 35).

The Fourth District noted that "an unidentified woman had been seen exiting the passenger side of the car and running from the scene of the accident along with defendant" to support its theory that Oliver was speaking about his wife's potential testimony in the DUI case, here. *Hutt*, 2022 IL App (4th) 190142, ¶¶ 9, 43. However, the purported female passenger discussed in the DUI case was never identified, (R. 145-46), and Mr. Hutt's wife never testified at trial in the DUI and obstruction cases. (See R. 125-207).

In case number 16-CF-752, though, which was also before the trial court at that time, Oliver had been charged with resisting an officer, from facts arising out of a domestic disagreement with his wife, Sierra Parrish-Hutt. *People v. Hutt*, 2020 IL App (4th) 180333-U, ¶¶ 12-22 (cited here for background and clarification, and not for precedent). In that case, his wife was being called to testify against him. *Id*. That case, 16-CF-752, is the case that Oliver was referring to in the passage above. See *id*.

Further, the DUI case was a misdemeanor, and so no discussion about extended-term eligibility would have made sense if Oliver were discussing 17-DT-51. The eligibility for an extended-term sentence based on previous felony convictions within the prior ten years only applies to felonies, (730 LCS 5/5-5-3.2(b) (2017)), and thus it would have been nonsensical for the prosecution and Oliver to be discussing extended-term eligibility as it relates to his misdemeanor DUI case.

Thus, since Oliver spoke about extended-term eligibility and his wife testifying against him in the case in which he waived his right to jury trial, he could only have been talking about having waived that right in the felony case, number 16-CF-752. (R. 53), see *Hutt*, 2020 IL App (4th) 180333-U, ¶¶ 12-22. Those concerns about extended-term eligibility and the possibility of his wife testifying against Oliver were wholly absent from 17-DT-51. Therefore, Oliver never spoke of waiving his jury trial in 17-DT-51, and did not "admit" to waiving his jury trial right in 17-DT-51. He could not have "invited the error," as the Appellate Court ruled, particularly since this statement was given in the context of Oliver insisting on his right to a jury trial. See *Hutt*, 2022 IL App (4th) 190142, ¶ 43; (R. 52-53).

Ineffective Assistance of Counsel

Hutt was also denied his right to the effective assistance of counsel when defense counsel incorrectly and repeatedly advised the trial court that Hutt had waived his right to jury trial on October 25, 2017, (R. 52-54), March 21, 2018, (R. 66), and April 25, 2018. (R. 77). Claims of ineffective assistance of counsel are evaluated under the two-pronged test of substandard representation and resulting prejudice as set forth in *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness and that he was prejudiced as a result, *i.e.,* that, but for counsel's unprofessional errors, a reasonable probability exists that the results of the proceeding would have been different. *Strickland*, 466 U.S. at 687.

The decision as to whether to choose a bench trial or jury trial belongs to the defendant, not to his counsel. *People v. McCarter*, 385 Ill.App.3d 919, 943 (1st Dist. 2008). Where a defendant's challenge to a jury waiver is predicated on a claim of ineffective assistance, the court must determine: (1) whether counsel's performance fell below an objective standard of reasonableness; and (2) whether there exists a reasonable likelihood that the defendant would not have waived his jury right in the absence of the alleged error. *People v. Batrez*, 335 Ill. App. 3d 772, 782 (1st Dist. 2002). In order to successfully establish the deficient representation prong under *Strickland*, the defendant must show the attorney's conduct was objectively unreasonable and the attorney's misconduct or misrepresentations were determinative and reasonably relied upon. See *People v. Correa*, 108 Ill. 2d 541, 549 (1985).

In this case, defense counsel incorrectly advised the trial court that Oliver had waived his right to jury trial on October 25, 2017, (R. 52-54), March 21, 2018, (R. 66), and April 25, 2018. (R. 77). This misrepresentation was dispositive and relied upon by the court in setting the case for bench trial and ignoring Oliver's insistence on jury trial. (R. 53-54, 66, 77).

Counsel's misrepresentations that Oliver had waived his right to jury trial were therefore objectively deficient conduct. See *Correa*, 108 Ill.2d at 549. The likelihood that Oliver would not have waived his jury right in the absence of the alleged error is evident in the record where Oliver repeatedly requested his jury trial at subsequent court appearances. (R. 66, 77).

As both deficient performance by counsel and prejudice appear on the record, Oliver Hutt was denied the effective assistance of counsel. *Strickland*, 466 U.S. at 687. Further, the court itself erred in finding that a jury waiver had occurred when no such waiver had been made in open court. (See 4-19-0142 R. 76-90); 725 ILCS 5/103-6; *Smith*, 106 Ill.2d at 334. These errors had the effect of denying Oliver his constitutional right to trial by jury. This Court should therefore vacate his conviction and finding of guilt in 17-DT-51 and remand the case for further proceedings. *Ruiz*, 367 Ill. App. 3d at 239-40.

II.

The evidence was insufficient to find Oliver Hutt guilty of obstruction of justice when he took no action to conceal or destroy evidence and the search warrant did not command him to do anything.

As a matter of law, Oliver Hutt could not have "concealed" his blood, when he took no action to move that blood from a state of visibility to a state of being hidden. See *People v. Comage*, 241 Ill. 2d 139, 144 (2011). He therefore could not have obstructed justice by concealing evidence, as charged in this case. (C. 9). In addition, the evidence that Oliver actually refused any direct request for his blood or urine was insufficient to sustain a conviction. (R. 120-43). The warrant in this case did not order Oliver to do anything, and he therefore took no action in contravention of its requirements. (C. 39). This Court should therefore vacate Oliver's conviction and vacate the trial court's finding of guilt outright, as retrial would improperly submit him to double jeopardy. *People v. McKown*, 236 Ill. 2d 278, 311 (2010).

Standard of Review

A challenge to the sufficiency of the evidence is reviewed by asking whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 47. The State has the burden to prove every element of an offense beyond a reasonable doubt. *People v. Lucas*, 231 Ill. 2d 169, 178 (2008). That burden never shifts to the defendant. *People v. Weinstein*, 35 Ill. 2d 467, 470 (1966).

However, Illinois courts review *de novo* challenges to the sufficiency of the evidence when the facts are undisputed and the defendant's guilt is a question of law. *In re Ryan B.*, 212 Ill. 2d 226, 231 (2004); *People v. Smith*, 191 Ill. 2d 408, 411 (2000). Oliver Hutt does not contest the facts adduced at trial in relation to his conviction for obstructing justice but instead asserts his actions do not constitute obstruction of justice. Thus, *de novo* is the proper standard of review in this case. *In re Ryan B.*, 212 Ill. 2d at 231.

In addition, issues of statutory construction involve questions of law and are subject to *de novo* review. *People v. Howard*, 2017 IL 120443, ¶ 19. As the ultimate legal question in this case turns on the construction of the obstruction of justice statute at 720 ILCS 5/31-4(a) (2017), *de novo* is the proper standard of review.

No Definition of Concealment Applies In This Case

Oliver was charged with obstruction of justice in that "he, with the intent to obstruct the prosecution of Oliver J. Hutt, intentionally concealed evidence from [officers] in that he refused to submit to blood and urine testing after being ordered to comply with such through a search warrant." (C. 9). Under the statute cited by the charging document, Section 31-4(a), a person obstructs justice when, "with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he or she knowingly commits any of the following acts: (1) Destroys, alters, conceals or disguises physical evidence, plants false evidence, furnishes false information." (C. 9); 720 ILCS 5/31-4(a). As charged in this case, then the State was required to prove that Oliver concealed his blood. (See C. 9); 720 ILCS 5/31-4(a).

While the word "conceal" is undefined in Section 31-4, this Court has relied on the dictionary definitions of that word that were given in *Comage*, 241 Ill.2d at 144. Quoting Webster's Third New International Dictionary 469 (1961), this Court provided that the two relevant definitions are:

> "1: to prevent disclosure or recognition of: avoid revelation of: refrain from revealing: withhold knowledge of: draw attention from: treat so as to be unnoticed * * *;
>
> and
>
> 2: to place out of sight: withdraw from being observed: shield from vision or notice * * *." *Comage*, 241 Ill.2d at 144.

In the case at bar, Justice Cavanagh dissented from the Fourth District's majority on the issue of whether the evidence was sufficient to sustain a conviction for obstruction of justice. *Id.*, at ¶¶ 79-85. Justice Cavanagh pointed out that the majority had relied on the first definition

of "concealment" that was provided in *Comage*, that is, to prevent the disclosure of something. *Id*., at ¶ 81. However, as Justice Cavanagh correctly highlighted, that definition only applies to preventing the disclosure of information, facts, or feelings – not the preventing of disclosure of physical things. *Id*. To conceal a physical thing, like blood or other physical evidence, one must move that thing to a state of being out of sight. *Id*., at ¶¶ 82-83. There was no evidence to suggest that Oliver moved his blood from a discoverable state to a state of being out of sight, and so he could not have been convicted of obstruction of justice for "concealing" his blood. *Id*., at ¶ 83.

The dissent cited dictionary definitions of the verb "conceal," which showed that concealment meant one of two things: 1) either the non-disclosure of *information* or 2) the placing out of sight of *people or things*. *Id*., at ¶¶ 82-83. Three different dictionaries, as cited by the dissent, give substantially the same definitions for this word, and the two additional dictionaries quoted by the dissent highlight the division of those two categories of definitions from *Comage*. *Id*. These dictionary entries indicate that information can be concealed by the act of non-disclosure of that information, but that physical objects (like blood) can be concealed by the movement of that object from a state of being visible or discoverable to a state where that object is hidden. *Id*.

The Oxford English Dictionary Online provides the following definitions and examples of the usage of "conceal":

> "1.
> a. transitive. To keep (information, intentions, feelings, etc.) from the knowledge of others; to keep secret from (formerly also to) others; to refrain from disclosing or divulging.
>
> * * *
>
> 1828 W. Scott Fair Maid of Perth iii, in Chron. Canongate 2nd Ser. III. 50 Concealing from him all *knowledge* who or what he was.
> 1883 'G. Lloyd' Ebb & Flow II. xxix. 175 The latter could not conceal her *pleasure* at the bequest.
> 1921 F. Hutchins & C. Hutchins Sword Liberty ii. 27 While the marquis concealed his *intentions*, he openly avowed his sentiments.
> 2010 N.Y. Times 12 Apr. 5/1 He.does not conceal his *feelings* about the state of contemporary opera.

> * * *
>
> 2.
> a. transitive. To hide (a person or thing); to put or keep out of sight or notice. Also: to prevent from being visible.
>
> * * *
>
> 1877 Nineteenth Cent. Oct. 409 He.could have concealed *himself* in any one of a hundred hiding-places.
> 1921 C. Kingston Remarkable Rogues xix. 268 He.had the *canvas* concealed in the false bottom of a trunk and taken to America.
> 1994 Amer. Spectator Nov. 40/2 The behavior is typical of an attempt to conceal a *weapon*.
> 2012 Daily Tel. 20 July 30/2 I'm very conscious of my stomach, so I tend to conceal my *waist*." *Hutt*, 2022 IL App (4th) 190142, ¶ 82, quoting Oxford English Dictionary Online, https://www.oed.com/view/Entry/38066 (last visited Nov. 19, 2021) (emphasis added).

The Merriam-Webster Online Dictionary gives substantially similar definitions:

> 1: to prevent disclosure or recognition of
>
> // conceal the *truth*
> // She could barely conceal her *anger*.
>
> 2: to place out of sight
>
> // concealed *himself* behind the door
> // The defendant is accused of attempting to conceal *evidence*."
>
> *Hutt*, 2022 IL App (4th) 190142, ¶ 83, quoting Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/conceal (last visited Jan. 6, 2022) (emphasis added).

Every example given in those two dictionaries reinforces the definitions of the word "conceal" as used in Webster's Third New International Dictionary and relied upon by this Court in *Comage*, 241 Ill.2d at 144.

As Oliver was charged with concealing a thing, *i.e.*, his blood, the overwhelming lexicographical consensus supports Justice Cavanagh's reasoning that Oliver would have needed to take an affirmative step to place his blood out of sight to be guilty of obstruction of justice. ¶ 83. As Oliver did take any such step, the dissent was correct in concluding that the charge of obstruction of justice was not proven. *Id*, at ¶¶ 83-85.

Oliver did not "prevent disclosure or recognition of" his blood. He did not refrain from revealing his blood, or withhold knowledge of his blood, or draw attention away from his blood in the hopes that his blood would go unnoticed. The fact that he had blood in his body was a known fact that he did not try to obfuscate. Thus, the first definition in *Comage*, (and in both of the dictionaries cited by the dissent), which is based on hiding the knowledge of an object's existence, does not apply. *Id*., at ¶¶ 82-83, quoting the Oxford English Dictionary Online and the Merriam-Webster Online Dictionary. Nor did Oliver take any action to place his blood out of sight or to shield it from vision, which makes the second group of definitions, relating to the concealment of physical objects, inapplicable as well. See *id*. The blood was in the exact same state of discoverability that it was in before the officers took Oliver to the hospital, and Oliver took no action to change that condition. He thus did nothing to "conceal" any evidence. See *id*.

In *People v. Elsperman*, the State argued that by hiding from the police and "concealing his person," the defendant was allowing the passage of time to dissipate and eventually destroy the alcohol on his breath and hide other physical characteristics. *People v. Elsperman*, 219 Ill. App. 3d 83, 84 (4th Dist. 1991). The defense argued that "the person of the defendant" was not "physical evidence" envisioned by the statute and that the proper charge for a person who hides from a law enforcement officer, prior to arrest, may be misdemeanor resisting or obstructing a peace officer, but it is not felony obstruction of justice. *Id*., at 85.

The Fourth District agreed, holding that "[t]he plain language of section 31-4(a) of the Code renders awkward at best any effort to include the person of the defendant within the term 'physical evidence' that the defendant allegedly destroyed, altered, concealed, or disguised – those acts being the gravamen of the crime." *Elsperman*, 219 Ill. App. 3d at 85. The *Elsperman* court pointed to Section 31-4(c)'s prohibition on a defendant leaving the State

or "conceal[ing] himself." *Elsperman*, 219 Ill. App. 3d at 85. The Fourth District went on to say that if the legislature had intended section 31-4(a) of the Code to have the meaning which the State now argues, it would read as follows: "A person obstructs justice when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he knowingly * * * destroys, alters, conceals or disguises physical evidence, *conceals himself*, plants false evidence, [or] furnishes false information." *Id* (emphasis added).

The *Elsperman* court relied on the plain language of the statute to hold that Section 31-(4)(a), the statute under which Oliver was likewise charged, did not include the hiding of one's person as concealment of "physical evidence." *Id.* This holding was given directly in response to the State's concerns that such a hiding may dissipate and destroy the evidence of consumption of alcohol. *Id*., at 85. If the active hiding of a defendant's entire person to thwart prosecution for DUI cannot constitute concealment of physical evidence, then the far less culpable passive recalcitrance to submit to a requested taking of that person's blood cannot constitute concealment of physical evidence, either.

The holding in *Elsperman* is also supported by a full reading of Section 31-4(a). Subsection one of Section 31-4(a) provides that a person obstructs justice when they conceal physical evidence. 720 ILCS 5/31-4(a) (2017). But subsections two and three of Section 31-4(a) provide that a person also obstructs justice when they:

> "(2) Induce[] a witness having knowledge material to the subject at issue to leave the State or *conceal himself or herself*; or
>
> (3) Possessing knowledge material to the subject at issue, he or she leaves the State or *conceals himself*; * * *." 720 ILCS 5/31-4(a) (emphasis added).

As shown in these subsections, the legislature was quite capable of identifying the circumstances in which concealment of a defendant's person should amount to the felony charge of obstruction of justice. As discussed in *Elsperman*, had the legislature intended the concealment

of a defendant's body to constitute obstruction of justice, then subsection one of Section 31-4(a) would read as follows, to match the language used in subsections two and three:

> "(a) A person obstructs justice when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he or she knowingly commits any of the following acts:
>
> (1) Destroys, alters, conceals or disguises physical evidence, *conceals himself [or herself]*, plants false evidence, [or] furnishes false information."

Absent that italicized language, which does not appear in the statute, the charge of obstruction of justice does not apply to a situation where a defendant conceals themself in whole or in part, and this Court should not read that language into the statute where the legislature has chosen not to include it.

No Action Was Taken To Conceal Evidence

Further, regardless of whether a clear refusal would have constituted an affirmative act of "concealment" of evidence sufficient to sustain a felony charge of obstruction of justice, there is insufficient evidence that a clear refusal even occurred in this case. (See R. 120-43).

The evidence at trial was that Oliver was asked three times but only answered once, and that answer was ambiguous. First, Bemis asked Oliver for a sample (to which Oliver did not answer but instead asked the phlebotomist what his bond was). (R. 120, 141). Next, the phlebotomist asked Oliver to provide a sample (the answer to which, if any was given, the testimony was silent on). (R. 143). And finally, MeGee asked Oliver for a sample (the answer to which, if any was given, the testimony was again silent on). (R. 143).

At some point in those occurrences, according to MeGee's testimony, Oliver stated "no," but the passive voice in MeGee's testimony masks the questioner that Oliver was responding to: "he was asked if he would provide a blood sample and that the phlebotomist draw his blood or provide a urine sample and he stated no." (R. 141). It is unclear as to whether Oliver's "no" was given in response to a question from an officer or the phlebotomist. (R. 141).

If Oliver's statement of "no" was in response to a request from the phlebotomist, then it was not a direct refusal of the officer's request. As that exchange is the strongest evidence of any refusal, and it cannot be viewed a refusal beyond a reasonable doubt, the State has failed to show a clear refusal of testing and thus the State has failed to prove any action that was taken by Oliver to obstruct justice. (See R. 120-41).

Officer Bemis testified that he informed Oliver that a warrant was signed for blood and urine, so "he needed to provide them with samples." (R. 120). When Oliver said that he needed time to think about it, Bemis told him that he did not have time to think about it, and that they needed to do it now. (R. 120). Oliver then asked the hospital staff what his bond was. (R. 122-23). Bemis considered this question to be a refusal. (R. 123). Officer MeGee's testimony is more ambiguous, as he initially testified that Oliver was asked if he would provide a sample "and he stated no." (R. 141). The following exchange, though, occurring on cross-examination, indicates that, instead of Oliver actually "[stating] 'no,'" he simply asked a question of a third party that the officers chose to interpret as a refusal:

> "Q. And you didn't personally ask Mr. Hutt to submit to or provide a blood or urine sample; correct?
> A. I did.
>
> Q. You did?
> A. Yes.
>
> Q. Even though you didn't have the warrant?
> A. Yes. Officer Bemis had asked once. Then Mr. Hutt had talked to the phlebotomist about bond. We informed him that she had nothing to do with bond. She asked if he would provide a sample. And then I asked if he would provide a sample.
>
> Q. And when the phlebotomist asked, he asked her what his bond was; correct?
> A. Correct.
>
> Q. He didn't specifically refuse?
> A. He just asked what bond was." (R. 142-43).

Further, the warrant in this case did not direct Oliver Hutt to do anything at all. The search warrant commanded the officers to search Oliver's body, but, in a notable departure

from language commonly found on such warrants, this warrant did not order Oliver to comply with, accede to, or even not hinder the officers in their search. (C. 39). The search warrant said, in its entirety:

> "In the Circuit Court of the Eighth Judicial Circuit
> Of Illinois, Adams County
> To All Law Enforcement Officers:
>
> On this day, Officer Zach Bemis, Complainant, has subscribed and sworn to a Complainant for Search Warrant before me. Upon examination of the Complaint I find that it states facts sufficient to show probable cause.
> I, therefore, command that you search:
>
> 1) the body of Oliver J. Hutt, B/M DOB: 3/26/79 and seize the following instruments, articles and things:
>
> Blood and urine for the presence of alcohol and/or drugs,
>
> which have been used in the commission of, or which constitute evidence of the offenses of: Driving under the Influence of Alcohol and /or Drugs.
>
> I further command that a return of anything so seized shall be made without unnecessary delay before me, or before any court of competent jurisdiction." (C. 39).

The search warrant is directed "To All Law Enforcement Officers" and comments them to perform a search. (C. 39). There was no language in the warrant directing Oliver to do or refrain from doing anything. (See C. 39). Oliver was under no judicial direction to do anything, and the evidence is insufficient to show that he even directly refused any requests from the officers. (See C. 39, R. 120-43).

Conclusion

The State did not prove that Oliver took any action to conceal evidence and so the evidence was insufficient to convict. See *Lucas*, 231 Ill. 2d at178. Oliver took no action to move his blood from a visible state to a hidden state, and thus did not "conceal" physical evidence, as defined by this Court in *Comage*, 241 Ill.2d at 144. As a matter of statutory construction under *de novo* review, then, the obstruction of justice statute does not encompass the behavior in this case. See *Howard*, 2017 IL 120443, ¶ 19. Even had Oliver taken such an action, the

concealment of physical aspects of one's self, such as evidence of alcohol on one's breath, falls outside the purview of concealing "physical evidence" contemplated by the obstruction of justice statute. See *Elsperman*, 219 Ill. App. 3d at 83-85. There was no evidence of a clear refusal of the officer's requests for blood or urine testing. (R. 120-43). And finally, where there was no directive language in the search warrant that compelled or prohibited any behavior by Oliver, no rational trier of fact could have found that Oliver failed to comply with any such search warrant.(C. 39; 4-19-0142 C. 9). As a matter of law also under *de novo* review, then, Oliver's actions do not constitute obstruction of justice. *In re Ryan B.*, 212 Ill. 2d at 231. Oliver may not be subjected to a second trial. *McKown*, 236 Ill. 2d at 311. This Court should therefore reverse the trial court's finding of guilt on the charge of obstruction of justice outright. *Id*., at ¶ 38.

CONCLUSION

For the foregoing reasons, Oliver J. Hutt, defendant-appellant, respectfully requests that this Court reverse the trial court's finding of guilt in 17-CF-405 outright, and vacate the finding of guilt in 17-DT-51, remanding the latter for further proceedings including the right to a jury trial.

Respectfully submitted,

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COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is thirty-four pages.

/s/James Henry Waller
JAMES HENRY WALLER
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Oliver J. Hutt, No. 128170

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
ADAMS COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-19-0142
	)	Circuit Court No: 2017CF405
	)	Trial Judge: Robert K Adrian
v	)	
	)	
	)	
HUTT, OLIVER J	)	
Defendant/Respondent	)	

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FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
ADAMS COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-19-0142
	)	Circuit Court No: 2017CF405
	)	Trial Judge: Robert K Adrian
v	)	
	)	
	)	
HUTT, OLIVER J	)	
Defendant/Respondent	)	

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Plaintiff/Petitioner	)	Reviewing Court No: 4-19-0142
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	)	Trial Judge: Robert K Adrian
v	)	
	)	
	)	
HUTT, OLIVER J	)	
Defendant/Respondent	)	

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FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
ADAMS COUNTY, ILLINOIS

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	)	Circuit Court No: 2017DT51
	)	Trial Judge: Robert K Adrian
v	)	
	)	
	)	
HUTT, OLIVER J	)	
Defendant/Respondent	)	

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ADAMS COUNTY, ILLINOIS

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Plaintiff/Petitioner	)	Reviewing Court No: 4-19-0271
	)	Circuit Court No: 2017DT51
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	)	Circuit Court No:	2017DT51
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Defendant/Respondent	)		

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Defendant/Respondent	)	

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	)	Circuit Court No: 2017DT51
	)	Trial Judge: Robert K Adrian
v	)	
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	)	
HUTT, OLIVER J	)	
Defendant/Respondent	)	

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Report of Proceedings, 4-19-0271

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FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
ADAMS COUNTY, ILLINOIS

PEOPLE	)		
Plaintiff/Petitioner	)	Reviewing Court No:	4-19-0142
	)	Circuit Court No:	2017CF405
	)	Trial Judge:	Robert Adrian
v	)		
	)		
	)		
HUTT, OLIVER J	)		
Defendant/Respondent	)		

SUPPLEMENT TO THE EXHIBITS - TABLE OF CONTENTS

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Party	**Exhibit #**	**Description/Possession**	**Page No**
People	1	SEARCH WARRANT FOR BLOOD & URINE-6/26/2018	SUP E 4 - E6

No. 4-19-0142

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- OLIVER J. HUTT, Defendant-Appellant.	)	Appeal from the Circuit Court of the Eighth Judicial Circuit, Adams County, Illinois No. 17-CF-405 Honorable Robert K. Adrian, Judge Presiding.

FILED

MAR 20 2019

Lori R. Bachmeier
Clerk Circuit Court 8th Judicial Circuit
ILLINOIS, ADAMS CO.

AMENDED NOTICE OF APPEAL

An appeal is taken to the Appellate Court, Fourth Judicial District:

Appellant(s) Name:	Mr. Oliver J. Hutt
Appellant's Address:	2813 Blue Ridge Road Columbia, MO 65202
Appellant(s) Attorney:	Office of the State Appellate Defender
Address:	400 West Monroe Street, Suite 303 Springfield, IL 62704
Offense of which convicted:	Obstructing Justice
Date of Judgment or Order:	February 25, 2019
Sentence:	24 months probation and 110 days periodic imprisonment
Nature of Order Appealed:	Conviction and Sentence

JOHN M. MCCARTHY
ARDC No. 6216508
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(217) 782-3654
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IN THE CIRCUIT COURT OF THE
EIGHTH JUDICIAL CIRCUIT
ADAMS COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS

NO: 17DT51

Vs
Oliver J Hutt

NOTICE OF APPEAL

An appeal is taken from the Order and Judgment described below:

1. Court to which Appeal is taken: **The Appellate Court of Illinois**

2. Name of Appellant and address to which notices shall be sent:

   A. NAME: **Oliver J Hutt**
   2813 Blueridge Road
   Columbia MO 65202

If appellant is indigent and has no attorney, does he want one appointed?
Yes

3. Name and Address of Appellant's Attorney on Appeal
   Name: **Jacqueline L Bullard, Appellate Defender's Office**
   400 West Monroe St Suite 303
   Springfield, Illinois 62705-5240

4. Date of Judgment or Order: **4-30-19**

5. Offense of which convicted: Driving Under Influence of Alcohol

6. Sentence: 12 month probation

7. If appeal is not from a conviction, nature of order appealed from: Finding of Guilty by Bench Trial and Judgment Sentence to Illinois Department of Corrections

8. If the appeal is from a judgment of a Circuit Court holding unconstitutional a statute of the United States or of this state, a copy of the court's findings made in compliance with Rule 18 shall be appended to the notice of appeal

Hori R. Stechwondner
Circuit Clerk

SEAL

Dn M Tivacy

C 62

2022 IL App (4th) 190142

NOS. 4-19-0142, 4-19-0271 cons.

FILED
January 18, 2022
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. OLIVER J. HUTT, Defendant-Appellant.	)	Appeal from the Circuit Court of Adams County Nos. 17DT51 17CF405 Honorable Robert K. Adrian, Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court, with opinion.
Presiding Justice Knecht concurred in the judgment and opinion.
Justice Cavanagh specially concurred in part and dissented in part, with opinion.

OPINION

¶ 1 The State charged defendant, Oliver J. Hutt, with driving while under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2016)) in case No. 17-DT-51 and with obstructing justice (720 ILCS 5/31-4(a)(1) (West 2016)) in case No. 17-CF-405. Following a joint bench trial, the trial court found defendant guilty of both offenses. The court sentenced him to concurrent terms of probation and required defendant to pay restitution.

¶ 2 Defendant appeals in both cases, and we have consolidated the two appeals.

¶ 3 Defendant argues that (1) the trial court improperly denied defendant a jury trial because he did not waive that right, (2) trial counsel was ineffective for misrepresenting that defendant waived a jury trial, (3) the evidence was not sufficient to find defendant guilty of obstruction of justice beyond a reasonable doubt, and (4) the trial court's order for restitution was

erroneous. We agree only with defendant's fourth contention. Accordingly, we vacate the restitution order and remand for further proceedings; we affirm the trial court's judgment in all other respects.

¶ 4 I. BACKGROUND

¶ 5 A. Pretrial Proceedings and the Jury Waiver

¶ 6 In July 2017, the trial court conducted a preliminary hearing in case No. 17-CF-405. After finding probable cause, the court arraigned defendant and informed him, "You have the right to a speedy public trial, either a jury trial or a bench trial if you wish to waive or give up your jury trial right."

¶ 7 On October 10, 2017, defendant signed a jury waiver in two cases: the obstructing justice case (case No. 17-CF-405) and case No. 16-CF-752, in which he was charged with resisting a peace officer. Those were the only two case numbers written in the caption of the jury waiver. (The DUI case, case No. 17-DT-51, was not mentioned.) The preprinted language of the jury waiver read, "[T]he defendant *** waives his right to a trial by jury, in the above entitled cause [sic], and consents to a trial by Court, without Jury." (Emphasis added.)

¶ 8 On October 25, 2017, the trial court conducted a status hearing for five criminal cases pending against defendant, including the DUI case. The court began the hearing by announcing, "Taking up 16-CF-752, 17-CF-405, 17-DT-51, 17-TR-2415, and [17-TR-]2416, People versus Oliver Hutt. [Defendant] appears in person and with counsel, Mr. Chris Pratt." (The traffic cases charged defendant with leaving the scene of an accident (625 ILCS 5/11-402 (West 2016)) and improper lane usage (id. § 11-709)). Defense counsel remarked, "[Defendant] had previously waived his right to a jury trial." Addressing defendant personally, the court informed him, "[Y]ou've waived your right to a jury trial, so unless there's some other request from you, we

are going to set these matters for a bench trial because that would be the next appropriate step." (Emphasis added.) Defense counsel interjected that plea negotiations were underway and that, as he had explained to defendant, "his options [were] either set it for a bench trial or accept that negotiation and set this matter for a plea." The court asked defendant what he wanted to do.

¶ 9 Instead of answering that question, defendant discussed why he had waived a jury trial. He did not dispute that he had, in fact, waived a jury trial. He explained why he had done so (and to put his explanation in context, we note that an unidentified woman had been seen exiting the passenger side of the car and running from the scene of the accident along with defendant):

> "I was asking for my jury trial because I was facing—they're telling me I'm facing extended term, and I shouldn't be facing extended term. My last conviction was 2/25 of 2002, and they keep coming with dates of 2013 and 2008 to put me in a ten-year period. And they tried to force my wife to testify against me against her will, and that's the reason why I waived my jury trial." (Emphases added.)

See 730 ILCS 5/5-5-3.2(b)(1) (West 2016) (providing that a defendant convicted of a new felony within 10 years after previously being convicted of a felony, "excluding time spent in custody," is eligible for an extended-term sentence).

¶ 10 The trial court responded that, in any event, defendant had waived a jury trial and that the waiver would stand unless defendant filed a motion to withdraw the waiver:

> "Well, you waived your right to a jury trial. That's a waiver of jury trial, and unless you would file something to withdraw that, you've waived your right to a jury trial.
>
> ***
>
> * * *
>
> *** Well, this is what we're going to do: We're going to set these cases for

a bench trial since he's waived his right to a jury trial. And at this time he's not accepting any plea offer. It's up to the State whether or not the State wants to withdraw that offer or not. I'm not going to force them to do any of that.

But we're going to set these cases for a bench trial." (Emphases added.)

¶ 11 In March 2018, the trial court noted that defendant was present with defense counsel and that the resisting case, case No. 16-CF-752 (in which, in the interim, the court had found defendant guilty in a bench trial), was set for sentencing that day. Additionally, the court noted that the other cases pending against defendant, including the DUI case (case No. 17-DT-51), were up for a status hearing.

¶ 12 The State suggested getting the status hearing out of the way first:

"[THE PROSECUTOR]: Judge, before we get into that, can we just select a date in [case Nos.] 17-CF-405, 17-DT-51, and the TR numbers? Those are—were tracking for status, but the next step is, if [defendant] still wants it, a bench trial. So if we can just select that date, and then jump right into the sentencing?"

¶ 13 Defense counsel then responded as follows:

"Your Honor, I met with [defendant] earlier this week specifically on that issue and also to review the [presentence investigation report] in this case. As to 17-CF-405 [(the obstructing justice case)], [defendant] informed me that he does wish to proceed to trial on that matter.

In addition, [defendant] is quite insistent at least in his discussions with me that he is still entitled to a trial by jury in that case. I informed him that, on the date that he had waived in this case, he had waived on both of those cases going so far as to show him the scanned copy of that waiver contained with the circuit clerk's

file. He does not agree with that." (Emphasis added.)

In other words, according to defense counsel, the jury waiver, which defendant signed on October 10, 2017, applied, by its terms, to both the resisting case (case No. 16-CF-752) and the obstructing justice case (case No. 17-CF-405). Those were the two case numbers written in the caption of the jury waiver. When defendant insisted to defense counsel that he still had the right to a jury trial in the obstructing justice case, defense counsel demonstrated to the contrary by showing defendant the jury waiver that he had signed on October 10, 2017.

¶ 14 The trial court decided that it needed to review a transcript of the pretrial hearing that was conducted on October 10, 2017:

> "[W]e will get a transcript then of what took place at the hearing on the waiver, because the Court would need to know what was said when he waived before the Court could make any determination if he waived on both cases of what he was told. So why don't we set this for status on—or the other cases for status then on April the 25th at 8:45 a.m. And then the Court will order a transcript."

¶ 15 The sentencing hearing in the resisting case, case No. 16-CF-752, was continued because the prosecutor and defense counsel needed time to investigate defendant's eligibility for extended-term sentencing.

¶ 16 In April 2018, the trial court conducted a status hearing at which defendant appeared with counsel. The court began by announcing, "Next calling People versus Oliver Hutt in 16-CF-752, 17-CM-405, 17-DT-51, which includes tickets 17-TR-2415 and 2416." Defense counsel informed the court that he and the prosecutor agreed that defendant was eligible for extended-term sentencing (but defendant was unconvinced). With that question cleared up, the court set a sentencing hearing for the resisting case, case No. 16-CF-752.

¶ 17 Defense counsel then told the trial court, "[O]n the other case that is still pending, [defendant] indicates that he will want to take that to trial. He had waived earlier his right to a jury trial, so he needs to set that for a bench trial." (Actually, two other cases were pending, although they were factually related: the DUI case (No. 17-DT-51) and the obstructing justice case (No. 17-CF-405). Again, these are the two cases on appeal.) After conferring with the parties off the record, the court inquired as follows:

> "THE COURT: What time would you like to start Tuesday, June 26, all-day trial in 17-CF-405?
>
> [THE PROSECUTOR]: 9:00?
>
> [DEFENSE COUNSEL]: That's fine.
>
> THE COURT: All right."

Thus, the DUI case was mentioned only at the beginning of this status hearing, and it was not explicitly set for a bench trial (although the obstructing justice case was).

¶ 18 On June 26, 2018, however, the trial court announced that the DUI case was one of the cases scheduled to be tried that day in a consolidated bench trial:

> "THE COURT: We are taking up [case Nos.] 17-CF-405, \17-DT-51\, 17-TR-2415 and [17-TR-]2416, People versus Oliver Hutt. [Defendant] appears in person and with counsel ***. People appear by Assistant State's Attorney ***.
>
> We are set today for a bench trial on all of these cases.
>
> And, [Assistant State's Attorney], are you prepared for a bench trial today?
>
> [THE PROSECUTOR]: Yes, Your Honor.
>
> THE COURT: [Defense counsel], are you prepared for a bench trial today?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.

> THE COURT: All right. And any—for the record, [case No.] 17-CF-405 is an Information which alleges the offense of obstructing justice. [Case No.] 17-DT-51 is a driving under the influence of alcohol. [Case No.] 17-TR-2415 is leaving the scene of an accident and [case No.] 17-TR-2416 is improper traffic lane usage." (Emphases added.)

¶ 19 B. Evidence at Trial

¶ 20 The parties waived opening statements, and the State presented its evidence in the consolidated bench trial. In a nutshell, the evidence tended to show the following. (We omit much of the evidence pertaining to the DUI because the sufficiency of the evidence in that case is uncontested.)

¶ 21 On May 20, 2017, shortly after arresting defendant for DUI, Quincy police officer Zach Bemis obtained a search warrant for defendant's blood and urine. (Defendant had refused a breath test.) In the laboratory of Blessing Hospital, Bemis presented defendant with a copy of the search warrant, which commanded Bemis to "search *** the body of [defendant]" and to "seize *** [b]lood and urine for the presence of alcohol and/or drugs."

¶ 22 On direct examination, the State and Bemis engaged in the following question and answer:

> "Officer MeGee transported [defendant] over to Blessing Hospital and I met them there with the signed search warrant. I informed [defendant] that the search warrant was signed for his blood and urine, you know, so he needed to provide us with those samples. He said that he needed time to think about it. And I told him we didn't have time to think about it, we needed to do it now. And he was asking the staff what his bond was and he really wasn't answering anything so we took that as a

refusal since he would not submit to the tests that he was being ordered to submit to.

Q. So at the hospital, he refused to offer or submit to any blood or urine samples to be taken; is that right?

A. Yes.

Q. And this was done after he was presented with the search warrant that had been signed by the judge?

A. Yes.

Q. And do you recall if he was told that if he refused, if that would result in any further charges?

A. I don't recall if I told him that, that he would have additional charges. Usually on search warrants, I usually don't. That way they're more inclined not to refuse, if they just know that a judge has signed an order for them to provide the sample. But I don't remember if I told him that he would be arrested for some additional charges or not."

¶ 23 On cross-examination, defense counsel and Bemis engaged in the following question and answer:

"Q. So then you said [defendant] was transported to Blessing Hospital. You said that you showed him the search warrant and asked him if he would submit, correct?

A. Correct.

Q. And he said he didn't know if he wanted to give it to you?

A. Correct.

Q. And you asked if he was refusing?

A. Correct.

Q. And he said he had—he needed time to think about it?

A. Correct.

Q. And then you asked again to provide it and he just seemed confused. He was asking the medical staff what his bond was?

A. Correct.

Q. And so you said, and your words on direct were [‘]I took that as a refusal?[’]

A. Correct.”

Bemis agreed that the warrant ordered the police to seize evidence and did not order defendant to do anything.

¶ 24 On redirect examination, the State asked the following questions, and Bemis provided the following answers:

“Q. Why was [defendant] taken to the hospital?

A. To allow the medical staff there to be able to perform either the blood draw or the urinalysis.

Q. And [defendant] never, at any time, said yes, hook me up? You may take blood from me?

A. No, he never did.

Q. He never allowed anybody to touch him and take blood from him, did he?

A. No.

Q. And he never submitted to a urine sample?

A. No."

¶ 25 The trial court followed up by asking questions of its own, as follows:

"THE COURT: Once you've received that search warrant and you're at the hospital, is [sic] there procedures that the Quincy Police Department have as to how to execute that search warrant?

THE WITNESS: Yes.

THE COURT: And could you explain what those procedures are?

THE WITNESS: We explain to the arrestee that a search warrant has been signed for their blood and for their urine and they need to provide that. We do that with the medical staff there. If they agree to that, then the medical staff will do the blood draw and provide the cup for the urinalysis. And if they refuse to do that, we don't force them. We don't hold them down or anything like that. We just basically leave the scene and go back to headquarters so."

The court asked whether the police could have held defendant down and forcibly taken some of his blood. Bemis acknowledged that they could have but explained that the police typically do not do so because of the risk of injury to the suspect, officers, and medical staff.

¶ 26 Robert MeGee, another Quincy police officer who was also present at the hospital, testified that he asked defendant to provide samples of his blood and urine. Defendant said no. MeGee testified that, while waiting, defendant "seemed a little angry," called Bemis and MeGee "racist," and was "cussing and just [expressing] general disdain for the situation." On direct examination, MeGee further testified as follows:

"Officer Bemis just told him that he had a signed search warrant. Showed it to him.

I believe he provided him with a copy of it. Read over it with him and asked him if he was going to give a blood sample and urine sample.

Q. And at that point, what did [defendant] say, if anything?

A. He said no.

Q. Did he say anything else to anyone else?

A. There was a lot of back and forth between [defendant] and the phlebotomist that was there. He, at one point, asked her what his bond was and then Officer Bemis and I had to inform him that Blessing Hospital staff had nothing to do with the case other than they were there to draw blood.

Q. And did [defendant] ever specifically answer or say no, I am going to refuse to give you blood or give you urine?

A. He didn't use those exact words[,] but he was asked if he would provide a blood sample and that the phlebotomist draw his blood or provide a urine sample and he stated no.

Q. And, in fact, he never did allow anybody to take a blood sample, did he?

A. No.

Q. He never did provide a urine sample, did he?

A. No.

Q. At some point after no samples were obtained, what took place with [defendant]?

A. He was asked on at least three separate occasions if he would provide blood and urine, refused all three times, and then he was transported back to *** headquarters ***."

¶ 27 On cross-examination, MeGee testified as follows:

"Q. And you didn't personally ask [defendant] to submit to or provide a blood or urine sample; correct?

A. I did.

Q. You did?

A. Yes.

Q. Even though you didn't have the warrant?

A. Yes. Officer Bemis had asked once. Then [defendant] had talked to the phlebotomist about bond. We informed him that she had nothing to do with bond. She asked if he would provide a sample. And then I asked if he would provide a sample.

Q. And when the phlebotomist asked, he asked her what his bond was; correct?

A. Correct.

Q. He didn't specifically refuse?

A. He just asked what bond was."

¶ 28 C. The Trial Court's Decision

¶ 29 At the conclusion of the bench trial—with some uncertainty about whether the proved conduct fit the charged crime—the trial court found that defendant's recalcitrance at the hospital qualified as obstructing justice by concealment of physical evidence (720 ILCS 5/31-4(a)(1) (West 2016)). The court reasoned as follows:

"Then we come to the obstructing justice charge and, quite frankly, the Court has several—had several questions concerning the appropriateness of that

charge when a defendant doesn't submit when being ordered to have his blood or urine taken. However, the Court can now rely on *** appellate direction because there is *** precedent in this case which actually is right on point on this. *** [T]he Appellate Court says it is a proper charge in this case and *** affirmed the finding of the defendant's guilt in a situation just like this where there is a search warrant and the defendant failed to submit to the testing and the Court says that, in fact, that is and can be the basis for an obstructing justice charge because, in fact, the body is concealing the evidence as to the driving under the influence because every minute that goes by, the body is dissipating that alcohol and that is concealing the evidence. And when the defendant does not submit to that, does not submit to the search warrant, then he is concealing that evidence and so that is a proper charge.

And in this case, as with the case that was in the Appellate Court, even though the officers could, if they wanted to, hold him down and forcibly take that blood, the Appellate Court basically came down on the side of, well, they shouldn't even if they can because it poses a risk of injury to everyone involved, not only the officer but the defendant and anyone else, court, or not court, but the hospital personnel who would be aiding in the taking of that blood. So the—the Appellate Court has said it is a proper charge.

In this case, the defendant, while he never refused, the issue is he never submitted, and it's not the refusal that is the key here as to a refusal with the statutory summary suspension, it's the fact that he doesn't submit because every minute that goes by that he doesn't submit, then he is concealing that evidence. And so the fact that he didn't submit when asked to is the key, and he never submitted

to that even though he was asked three different times, according to Officer MeGee, to submit, he never did. He never submitted. He continued to conceal that evidence. And so the Court would find the defendant guilty of obstructing justice."

¶ 30 D. Defendant's Sentence

¶ 31 After the trial court found defendant guilty, it sentenced him to 24 months of probation for obstructing justice. For DUI, the court sentenced him to 12 months of probation.

¶ 32 That left the question of the damage to the pickup truck defendant collided with. At the conclusion of the sentencing hearing, the following discussion regarding restitution ensued:

"THE COURT: [Counsel], for the record, on 17-DT-51, there was a request for restitution; is that correct?

[THE PROSECUTOR]: Yes, Your Honor, and there is a proposed restitution order.

[DEFENSE COUNSEL]: I have seen that order, Your Honor. Certainly, obviously[,] [defendant], again, continues to profess his innocence. I believe there was sufficient testimony at the bench trial to support that restitution order.

THE COURT: All right. The Court is going to order that restitution."

¶ 33 However, the record of the sentencing hearing is devoid of any evidence on the dollar amount of damage to the pickup truck. The restitution order refers to a State Farm Insurance Company (State Farm) claim number, and the bottom right corner of the restitution order is marked "Discovery #2."

¶ 34 By the terms of the restitution order, defendant was ordered to pay $9925.80 to State Farm at a specified address. But first he must pay $250 to Tyler Bridgeman at a specified address to reimburse him for his insurance deductible. The restitution order, however, imposes no

deadlines for payment to either State Farm or Bridgeman. Nor does the restitution order specify whether payment to State Farm or Bridgeman is to be made in installments or in a lump sum. Even so, in the proceedings below, no objection was made to the form of the restitution order.

¶ 35 This appeal followed.

¶ 36 II. ANALYSIS

¶ 37 Defendant argues that (1) the trial court improperly denied defendant a jury trial because defendant did not waive that right, (2) trial counsel was ineffective for misrepresenting that defendant waived a jury trial, (3) the evidence was not sufficient to find defendant guilty of obstruction of justice beyond a reasonable doubt, and (4) the trial court's order for restitution was erroneous. We agree only with defendant's fourth contention. Accordingly, we vacate the restitution order and remand for further proceedings; we affirm the trial court's judgment in all other respects.

¶ 38 A. The Waiver of the Jury Trial in the DUI Case

¶ 39 1. Invited Error

¶ 40 On October 10, 2017, defendant signed a jury waiver that applied to only two cases: the obstructing justice case and the resisting case. Nevertheless, after defendant signed this jury waiver—which, by its terms, was limited to only those two cases—the trial court found that he additionally had waived a jury trial in the DUI case. By this mistake, defendant contends, the court breached its "duty to see that the election of an accused to forego a trial by jury [was] both expressly and understandingly made." People v. Surgeon, 15 Ill. 2d 236, 238, 154 N.E.2d 253, 255 (1958).

¶ 41 The State's initial response is that defendant has procedurally forfeited this contention. However, in the event that this forfeiture claim proves to be unavailing, the State argues

that defendant acquiesced to a bench trial. We need not address the State's forfeiture argument because we agree with the State that defendant acquiesced to a bench trial.

¶ 42 Silently acquiescing to an error results in a forfeiture, but actively ratifying the error results in estoppel. See People v. Holloway, 2019 IL App (2d) 170551, ¶ 44, 160 N.E.3d 995. If, in the trial court, defendant invited an error, he now is estopped from complaining of the error. See id.

¶ 43 On October 25, 2017, defendant told the trial court, "I waived a jury trial"—and, in context, he must have meant all five criminal cases pending against him because all of those cases were being discussed. Immediately before defendant admitted to the court, "I waived a jury trial," the court told him, "[Y]ou've waived your right to a jury trial, so unless there's some other request from you, we are going to set these matters"—including the DUI case—"for a bench trial because that would be the next appropriate step." In context, then, we deem defendant's acknowledgement "I waived a jury trial" as including the DUI case. In short, the effectiveness of the jury waiver in the DUI case is, at this point, beyond dispute. See id.

¶ 44 2. The Claim of Ineffective Assistance of Counsel in Misrepresenting a Jury Waiver

¶ 45 Defendant claims that his defense counsel "was ineffective for misrepresenting the existence of a jury waiver to the court." That claim is inconsistent, however, with the acquiescence we just discussed. The claim of ineffective assistance is just another way of asserting that defendant did not waive a jury trial in the DUI case. But that assertion is barred. See People v. Speight, 153 Ill. 2d 365, 379, 606 N.E.2d 1174, 1180 (1992); Holloway, 2019 IL App (2d) 170551, ¶ 44. If, as we have held, defendant has forfeited the assertion because he is estopped by acquiescence from making it, then, by logical corollary, there was no misrepresentation by defense counsel to the trial court—or none that we will entertain.

¶ 46 B. Obstructing Justice: Sufficiency of the Evidence

¶ 47 1. The Standard of Review

¶ 48 Defendant argues that "[t]he evidence was insufficient to find [him] guilty of obstruction of justice when he took no action to conceal or destroy evidence." He regards the facts as undisputed. Accordingly, in his view, his guilt of obstructing justice is a question of law, and our standard of review is de novo. See In re Ryan B., 212 Ill. 2d 226, 231, 817 N.E.2d 495, 498-99 (2004); People v. Smith, 191 Ill. 2d 408, 411, 732 N.E.2d 513, 514 (2000).

¶ 49 The State does not dispute that our standard of review is de novo. Nonetheless, the State asserts that, even applying the de novo standard, the undisputed facts meet the definition of obstruction. See Ryan B., 212 Ill. 2d at 231. Specifically, the State argues the following: "Defendant's failure to submit to the valid warrant and [to] the officers' lawful requests that he do so constituted obstruction of justice." In support of that argument, the State relies heavily on People v. Baskerville, 2012 IL 111056, 963 N.E.2d 898, and People v. Synnott, 349 Ill. App. 3d 223, 811 N.E.2d 236 (2004).

¶ 50 However, we disagree with both defendant and the State that (1) the facts are undisputed and (2) de novo review is appropriate in this case to determine if his conviction was proper. We acknowledge that "when the facts are not in dispute their legal effect may be a question of law." People v. Rizzo, 362 Ill. App. 3d 444, 449, 842 N.E.2d 727, 732 (2005) (citing In re Marriage of Kneitz, 341 Ill. App. 3d 299, 303, 793 N.E.2d 988, 992 (2003)). But in this case, the facts are in dispute.

¶ 51 First, contrary to his assertion, defendant does dispute the facts or, at the very least, the inferences to be drawn from those facts. Defendant claims that although he was asked three times to submit to a blood draw, at most, he responded "no" only once, and defendant even

questions whether the evidence was sufficient to show (1) whether defendant said no and (2) that defendant was responding to a police officer's demand to submit to a blood draw. Defendant also suggests that "[t]he extent of any 'refusal' by [defendant] in this case is far less clear [than People v. Kegley, 2017 IL App (4th) 160461-U]." However, the trial court found otherwise.

¶ 52 "If divergent inferences could be drawn from undisputed facts, a question of fact remains." People v. Lattimore, 2011 IL App (1st) 093238, ¶ 35, 955 N.E.2d 1244; see also People v. Loggins, 2019 IL App (1st) 160482, ¶ 32, 130 N.E.3d 432 (noting that de novo review is not appropriate where "the parties disagree about the inferences that can be drawn from the trial evidence").

¶ 53 Second, as we recently wrote in People v. Jackson, 2020 IL App (4th) 170036, ¶ 30, 165 N.E.3d 523, "It is hard to envision how de novo review could ever apply when, as here, the trial court has received testimony from live witnesses." We further noted that, "[e]ven when the parties have stipulated to the facts, [i]f the evidence presented is capable of producing conflicting inferences, it is best left to the trier of fact for proper resolution." (Internal quotation marks omitted.) Id.

¶ 54 Here, the trial court heard live testimony, evaluated the credibility of the witnesses, and drew inferences from the evidence to reach its conclusion. Accordingly, we conclude that the standard of review that normally applies in a criminal case—namely, "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (People v. Jackson, 2020 IL 124112, ¶ 64, 162 N.E.3d 223)—applies here. The Illinois Supreme Court has repeatedly stated that "[t]his standard of review applies in all criminal cases." (Emphasis added.) Id. We take the supreme court at its word and reserve de novo review to the narrow classes of cases identified by

the court. See, e.g., Ryan B., 212 Ill. 2d at 229 (reviewing sufficiency of the evidence de novo after stipulated bench trial).

¶ 55 2. The Law

¶ 56 Subsection (a)(1) of section 31-4 provides as follows:

> "(a) A person obstructs justice when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he or she knowingly commits any of the following acts:
>
> (1) Destroys, alters, conceals or disguises physical evidence, plants false evidence, [or] furnishes false information[.]" 720 ILCS 5/31-4(a)(1) (West 2016).

¶ 57 In case No. 17-CF-405, the information accused defendant of obstructing justice within the meaning of section 31-4(a)(1) in that "he, with the intent to obstruct the prosecution of [himself], intentionally concealed evidence from [a] Quincy [p]olice [o]fficer, in that he refused to submit to blood and urine testing after being ordered to comply with such through a search warrant." (Emphasis added.) In other words, "with intent to *** obstruct the prosecution *** of any person"—namely, himself—defendant "knowingly *** conceal[ed] *** physical evidence." Id. Concealing physical evidence is one of the statutorily specified means of obstructing justice. Id.

¶ 58 In People v. Comage, 241 Ill. 2d 139, 946 N.E.2d 313 (2011), the Illinois Supreme Court examined the obstructing justice statute and wrote the following:

> "The obstructing justice statute does not define the word 'conceal.' When a statutory term is undefined, it is appropriate to employ a dictionary definition to ascertain its meaning. See Landis v. Marc Realty, L.L.C., 235 Ill. 2d 1, 11[, 919

> N.E.2d 300] (2009). The obstructing justice statute was adopted in 1961. See 1961 Ill. Laws 1983, 2039 §31-4 (eff. Jan. 1, 1962). Webster's dictionary from that time contains two definitions of the word 'conceal.' The first definition states: '1 : to prevent disclosure or recognition of : avoid revelation of : refrain from revealing : withhold knowledge of : draw attention from : treat so as to be unnoticed ***.' Webster's Third New International Dictionary 469 (1961). The second definition states: '2 : to place out of sight : withdraw from being observed : shield from vision or notice ***.' Id." Id. at 144 (plurality opinion).

The supreme court concluded that "a defendant who places evidence out of sight during an arrest or pursuit has 'concealed' the evidence for purposes of the obstructing justice statute if, in doing so, the defendant actually interferes with the administration of justice, i.e., materially impedes the police officers' investigation." Id. at 150.

¶ 59 3. This Case

¶ 60 In this case, defendant refused a lawful order contained in a search warrant that required him to allow the police to take his blood or urine for testing. As an initial matter, we note that defendant does not claim that the warrant itself was illegal or improper.

¶ 61 We conclude that defendant's conduct in this case constituted the offense of obstructing justice. First, the evidence at issue meets the requirement of "physical evidence" contained in the obstructing justice statute. In People v. Watson, 214 Ill. 2d 271, 288, 825 N.E.2d 257, 266 (2005), the supreme court concluded, "A lawful grand jury subpoena for constitutionally protected physical evidence, such as blood, may be issued if supported by probable cause." (Emphasis added.) The court examined the requirements for a subpoena and a search warrant for a blood draw under the fourth amendment and referred to a person's blood as

physical evidence throughout its opinion. Id. at 283-88. Accordingly, we conclude that defendant's blood was "physical evidence" under the obstructing justice statute.

¶ 62 Second, defendant's actions meet the definition of "conceal" contemplated by the obstructing justice statute. In the context of this case, "conceal" does not mean " 'to place out of sight.' " See Comage, 241 Ill. 2d at 144. Obviously, defendant's blood was not visible. Instead, defendant's conduct meets the other definition for "conceal" described by Comage: " 'to prevent disclosure or recognition of : avoid revelation of : refrain from revealing.' " Id. This definition is entirely consistent with the supreme court's holding in Baskerville that a defendant can obstruct the legal process by failing to act as well as taking obstructive actions. Accordingly, we conclude that the circumstances present in this case—refusal to submit to a blood draw with knowledge of a valid search warrant for the same—can constitute obstructing justice by concealing physical evidence.

¶ 63 Third, defendant's actions were knowing. The State presented evidence that the police informed defendant of the warrant for his blood and then asked three separate times for defendant to submit to a blood draw. Defendant first responded by saying he had to think about it. This statement shows that defendant was aware of his obligation to submit to the blood draw. The trial court could have inferred that defendant's subsequent attempts to change the subject or ignore the question constituted a knowing refusal to submit to the warrant under the circumstances.

¶ 64 The State also presented evidence that defendant explicitly refused the officers' request on one of the occasions he was asked to submit. Although the testimony on this point is not as clear as it could have been, the trial court was entitled to resolve the discrepancies in favor of the State and to conclude that, whatever the specific form of communication, defendant

clearly refused to submit to the blood draw when asked. For the same reasons, the trial court was entitled to infer that defendant engaged in these actions with the intent to prevent his own prosecution.

¶ 65 After viewing the evidence in the light most favorable to the State, we conclude that (1) all of the elements of obstructing justice are present and (2) the State presented sufficient evidence to convict defendant beyond a reasonable doubt.

¶ 66 We note that the issue in this case is somewhat novel. A conviction would have been unquestionable had the police (1) informed defendant that his refusal to submit to the warrant could lead to a felony charge of obstructing justice and (2) directly asked defendant if he was refusing to submit and tried to get an explicit response from him. Nonetheless, we commend the police in this case for obtaining a search warrant, a practice that we encourage, particularly in this context.

¶ 67 The public interest is not well served if police officers or hospital staff are required to attempt to forcibly restrain or subdue a DUI suspect to obtain a blood sample. Accordingly, it is all the more important for police to explain clearly to DUI suspects that (1) a search warrant for their blood requires their compliance and (2) their noncompliance constitutes a separate felony offense. Given the privacy interests at stake and the invasive nature of the search, the coercive force of a potential felony conviction is almost certainly preferable to the coercive force of physical restraint.

¶ 68 C. The Restitution Order Was Deficient

¶ 69 Last, defendant argues that the restitution order is improper and requests a new hearing on the matter. We agree.

¶ 70 First, the restitution statute requires that, "[t]aking into consideration the ability of

the defendant to pay," the trial court "shall determine whether restitution shall be paid in a single payment or in installments, and shall fix a period of time *** within which payment of restitution is to be paid in full." 730 ILCS 5/5-5-6(f) (West 2018). The restitution order in this case specified no time period within which defendant was to pay the restitution. Nor did the restitution order say whether the restitution was to be paid in a lump sum or in installments. See id.

¶ 71 Second, " '[a]lleged losses which are unsupported by the evidence must not be used as a basis for awarding restitution.' " People v. Adame, 2018 IL App (2d) 150769, ¶ 14, 94 N.E.3d 248. Contrary to the remark by defense counsel at the conclusion of the sentencing hearing, no evidence had been put in the record regarding the amounts that State Farm and Bridgeman had paid for the damage to the pickup truck.

¶ 72 Recently, in People v. Birge, 2021 IL 125644, ¶ 49, the Illinois Supreme Court concluded a trial court commits clear error when it orders restitution in an amount that "ha[s] no actual basis in the trial or sentencing evidence and was simply declared by the prosecutor and accepted by the sentencing court." The supreme court held that such an error affects the integrity of the judicial process. Id. ¶¶ 50-53. The court vacated the restitution order and remanded for a new hearing "and a determination as to the appropriate amount of restitution owed." Id. ¶ 53. Similarly, this court has held that, when a trial court enters a restitution order that fails to state (1) the manner of payment and (2) when that payment is due, the appropriate remedy is to remand the case to the trial court for compliance with section 5-5-6(f) of the Unified Code of Corrections (730 ILCS 5/5-5-6(f) (West 2016)). People v. Hibbler, 2019 IL App (4th) 160897, ¶¶ 81-83, 129 N.E.3d 755.

¶ 73 Unlike Hibbler, the presentence investigation report in this case did not include an

amount of restitution and, in fact, indicated that no restitution was due. Cf. id. ¶¶ 90-92. Further, defense counsel never agreed with the State that the amount of restitution was correct. Instead, counsel's statements regarding the evidence presented at trial being sufficient to support the restitution award was clearly incorrect under Birge. No evidence was ever presented to the trial court—at trial, sentencing, or via court filing—regarding a dollar amount for restitution. Nor does the record contain any indication concerning how and when defendant must pay restitution.

¶ 74 Accordingly, we vacate the trial court's deficient restitution order and remand the case for further proceedings on restitution in the event the State wishes to pursue that matter on remand.

¶ 75 III. CONCLUSION

¶ 76 For the reasons stated, we affirm the trial court's judgment in part, vacate the restitution order, and remand for further proceedings consistent with this opinion.

¶ 77 Affirmed in part and vacated in part.

¶ 78 Cause remanded.

¶ 79 JUSTICE CAVANAGH, specially concurring in part and dissenting in part:

¶ 80 While otherwise agreeing with the majority's decision, I respectfully disagree that the evidence, viewed in the light most favorable to the prosecution, meets the cited description of obstructing justice, namely, "conceal[ing] *** physical evidence." See 720 ILCS 5/31-4(a)(1) (West 2016). To be sure, defendant's blood was "physical evidence." Id. However, he did not "conceal[ ]" his blood. Id. As the majority admits, he did not " 'place' " his blood " 'out of sight.' " Comage, 241 Ill. 2d at 144 (quoting Webster's Third New International Dictionary 469 (1961)). In other words, it was not that his blood initially was visible and that he then hid it. Nor can it be reasonably inferred that he cared about the visibility of his blood or its exposure to

sight. "Concealment" in the sense of obscuring something from view is inapposite in the circumstances of this case.

¶ 81 Even so, the majority holds that, by refusing to allow his blood to be drawn, defendant acted out the other definition of "conceal" quoted in Comage: " 'to prevent disclosure or recognition of : avoid revelation of : refrain from revealing.' " Id. (quoting Webster's Third New International Dictionary 469 (1961)). That definition of "conceal," however, pertains to information, facts, knowledge, intentions, and feelings—not to physical objects. The placing-out-of-sight definition of "conceal" is the one that pertains to physical objects.

¶ 82 To pursue this distinction further, compare the following two definitions of "conceal" from the Oxford English Dictionary Online:

> "1.
>
> a. transitive. To keep (information, intentions, feelings, etc.) from the knowledge of others; to keep secret from (formerly also to) others; to refrain from disclosing or divulging.
>
> * * *
>
> 1828 W. Scott Fair Maid of Perth iii, in Chron. Canongate 2nd Ser. III. 50 Concealing from him all knowledge who or what he was.
>
> 1883 'G. Lloyd' Ebb & Flow II. xxix. 175 The latter could not conceal her pleasure at the bequest.
>
> 1921 F. Hutchins & C. Hutchins Sword Liberty ii. 27 While the marquis concealed his intentions, he openly avowed his sentiments.

> 2010 N.Y. Times 12 Apr. 5/1 He does not conceal his feelings about the state of contemporary opera.
>
> * * *
>
> 2.
>
> a. transitive. To hide (a person or thing); to put or keep out of sight or notice. Also: to prevent from being visible.
>
> * * *
>
> 1877 Nineteenth Cent. Oct. 409 He could have concealed himself in any one of a hundred hiding-places.
>
> 1921 C. Kingston Remarkable Rogues xix. 268 He had the canvas concealed in the false bottom of a trunk and taken to America.
>
> 1994 Amer. Spectator Nov. 40/2 The behavior is typical of an attempt to conceal a weapon.
>
> 2012 Daily Tel. 20 July 30/2 I'm very conscious of my stomach, so I tend to conceal my waist." (Emphases in original.) Oxford English Dictionary Online, https://www.oed.com/view/Entry/38066 (last visited Nov. 19, 2021).

Because defendant's blood was not "information, intentions, feelings, etc.," the first of those definitions from the Oxford English Dictionary is inapplicable. The second definition likewise is inapplicable because defendant would have had no reason to care, particularly, whether anyone saw his blood.

¶ 83 Essentially the same two definitions can be found in Merriam-Webster Online

Dictionary:

> "1 : to prevent disclosure or recognition of
>
> // conceal the truth
>
> // She could barely conceal her anger.
>
> 2 : to place out of sight
>
> // concealed himself behind the door
>
> // The defendant is accused of attempting to conceal evidence."

(Emphases in original.) Merriam-Webster Online Dictionary, **********.merriam-webster.com/dictionary/conceal (last visited Jan. 6, 2022) [https://perma.cc/SYF4-U5ME].

I believe that the final example from Merriam-Webster, quoted above, fairly clinches the point: "The defendant is accused of attempting to conceal evidence," meaning that the defendant is accused of attempting to "place" the evidence "out of sight." (Emphasis in original.) Id. Likewise, defendant in the present case was accused of concealing evidence, specifically, his blood. That meant he was accused of placing his blood out of sight. He did not do so. Nor can it be reasonably inferred that he had an intention to do so. Whether anyone saw his blood was not his apparent concern. Rather, he did not want his blood to be taken to the laboratory and chemically analyzed.

¶ 84 It may be that defendant's passive recalcitrance qualified as obstructing a peace officer (720 ILCS 5/31-1(a) (West 2016)), as in Baskerville and Synnott. But he was not charged with obstructing a peace officer, and thus, Baskerville and Synnott are not on point. The charged offense of obstruction of justice through the concealment of physical evidence was, as a matter of law, unproven.

¶ 85 Therefore, in addition to the majority's disposition, I would reverse the conviction of obstructing justice.

No. 4-19-0142

Cite as:	People v. Hutt, 2022 IL App (4th) 190142
Decision Under Review:	Appeal from the Circuit Court of Adams County, Nos. 17-CF-405, 17-DT-51; the Hon. Robert K. Adrian, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Catherine K. Hart, and James Henry Waller, of State Appellate Defender's Office, of Springfield, for appellant.
Attorneys for Appellee:	Gary L. Farha, State's Attorney, of Quincy (Patrick Delfino, David J. Robinson, and Kathy Shepard, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

No. 128170

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- OLIVER J. HUTT, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 4-19-0142 and 4-19-0271 (Consolidated). There on appeal from the Circuit Court of the Eighth Judicial Circuit, Adams County, Illinois, No. 17-CF-405, 17-DT-51. Honorable Robert K. Adrian, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, Attorney General's Office, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 1, 2022, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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